FILED
MAY 15 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1228

HOWARD F. BISHOP,

Petitioner,

vs.

BANKERS BUILDING, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

HOWARD F. BISHOP,
Counsel for Petitioner, Pro se.

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BANKERS BUILDING, INC.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Howard F. Bishop respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

On March 25, 1942, respondent (plaintiff in the trial court) confessed judgment against petitioner (defendant below) upon three annual leases, in the Circuit Court of Cook County, Illinois, in the sum of $14,814.66 (R. 26). This sum consisted of $12,055.76 for rentals claimed to be due; $1,974.87, representing accrued interest at the rate of 7% per annum; and $784.03 for attorney's fees (R. 16).

A motion to open up said judgment and for leave to plead to the merits, with an affidavit and a counterclaim in support thereof, was filed by petitioner on April 21, 1942 (R. 26-32). Subsequently, a supplemental petition to open up said judgment, supported by affidavit, was filed by petitioner (R. 32-42). The substance of the defense and counter-demand set forth in these affidavits was (1) that under an executory contract, in the form of a rider, which was attached to and formed a part of each of the leases confessed upon, and which was then, and still is, in full force and effect, the amounts claimed to be due and upon which judgment was confessed, were payable solely in legal services to be rendered by petitioner to respondent, and not in cash; and (2) that such legal services had been and were being rendered, for which petitioner was entitled to credit upon said leases in the sum of $16,000.00 (R. 30). Petitioner asked for a jury trial to determine the value of the services thus rendered (R. 31).

After a summary hearing upon petitioner's affidavits and counterclaim, the trial court found that he was entitled to a credit, under the executory contracts forming a part of the leases confessed upon, in the sum of $764.97, for legal services rendered to respondent prior to the entry of the original judgment. Respondent's counsel also admitted, in open court, that petitioner rendered legal services to respondent subsequent to the entry of the original judgment by confession, for which petitioner was entitled to a credit of $272.36 under the executory contracts in question. The trial court thereupon deducted the total of these sums, or $1,036.33 from the original judgment and entered a new confession judgment against petitioner in the sum of $13,788.33 (R. 42-43). Petitioner was thus given credit only for such sums as the respondent admitted were due for legal services rendered under the executory

contracts and he was denied a jury trial and a hearing on the merits as to the value of the services which were in dispute. The judgment was appealed by petitioner to the Appellate Court of Illinois, First District, where the case was assigned to the Third Division.

While the case was pending in the Appellate Court, petitioner continued to perform legal services for respondent under the provisions of the executory contracts attached to the leases in question. In order to call the matter to that court's attention and to show that judgment was confessed upon an unliquidated claim in the trial court, contrary to law, petitioner asked leave to file an affidavit of facts occuring since the perfection of the appeal to the Appellate Court, describing the character of the services, which were rendered with the full knowledge and at the solicitation of the respondent. Leave was so granted and this original evidence and data appears in the record herein and in the Abstract of Appellate Court Record (Rec. 13). It clearly shows that subsequent to the entry of the reduced judgment by confession in the trial court, petitioner herein continued to render legal services to respondent, for which he was entitled to credit on the claimed past due rentals under the executory contract riders which formed a part of the leases upon which judgment was wrongfully confessed. As evidenced by Paragraph 20 of the Appellate Court's opinion (Rec. 27), respondent admitted that petitioner had been performing such services under said executory contracts and that up to the time of oral argument in the Appellate Court, petitioner was entitled to a further credit of $620.70 therefor.

In rendering its judgment, the Appellate Court deducted said amount from the trial court judgment, which also had been reduced in order to grant petitioner partial credit for

services rendered, and as thus modified ($13,157.63), the trial court judgment was affirmed (R. 71-75). The affidavits and counter-demands filed by petitioner in the trial court, of which the Appellate Court had full knowledge, showed that petitioner had performed a substantial amount of other legal services for respondent under said executory contracts, for which he was entitled to credit on the claimed unpaid rentals. But as to these other services, the Appellate Court held (Par. 16; R. 84-85).

> "Other paragraphs of the petition and supplemental petition, as grounds to vacate the judgment, allege cross-statements and counter-claims. It is the well settled rule that judgment by confession will not be opened to permit a defendant to file a counter-claim or cross-statement. (*Busse* v. *Muller*, 295 Ill. App. 101; *Stead* v. *Craine*, 256 Ill. App. 445; *Koehler* v. *Glaum*, 169 Ill. App. 537.) If the defendant has a claim or claims against the plaintiff he has his remedy. He may institute proceedings for the purpose of enforcing the same, and, if they are well founded the courts will grant him redress."

As hereinafter more fully pointed out, petitioner contends that this ruling abridged one of his privileges as a citizen of the United States and rendered an Act of the Illinois Legislature unconstitutional, and that it deprived him of due process of law and of the equal protection of the laws as guaranteed by the Federal Constitution.

From the judgment of the Appellate Court, modifying and affirming the judgment of the trial court, petitioner sought an appeal to the Supreme Court of Illinois. His petition for leave to appeal was disallowed however (R. 2). Thereupon petitioner sued out a timely writ of error from the Appellate Court to the Illinois Supreme Court, which said writ of error was considered on its merits but was dismissed on January 15, 1946 (R. 87).

Petitioner now seeks to have this Court review the judgment rendered herein.

Statement Disclosing the Basis Upon Which it Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

Petitioner submits that under Section 237(b) of the Judicial Code of the United States (28 U. S. C. A. sec. 344), this court has jurisdiction to review the judgment complained of herein because:

(1) By failing to abide by a prior ruling of the Illinois Appellate Court, whereby it was held that a counterclaim could be interposed in all confession cases, and thus violating the provisions of section 17 of the Illinois Appellate Court Act (1945 Ill. Rev. Stats., ch. 37, par. 41), the Appellate Court of Illinois has deprived petitioner herein of his rights and privileges as guaranteed by the first section of the 14th Amendment to the United States Constitution.

(2) If the Illinois Appellate Court had the power and jurisdiction to deny petitioner herein the privilege of interposing his counterclaim as a defense to the judgment confessed in the trial court, then said section 17 of the Illinois Appellate Court Act is repugnant to the provisions of section 1 of the 14th Amendment to the United States Constitution in that it is too vague and uncertain and permits the exercise of arbitrary and capricious power by the Appellate Courts of Illinois.

Prior to 1935, said section 17 of the Illinois Appellate Court Act provided as follows:

> "Sec. 17. All opinions or decisions of said (Appellate) court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein

> the reasons for such opinion or decision, and be filed in the cause in which rendered; *Provided,* that such opinion shall not be binding authority in any cause or proceeding, other than in that in which they may be filed."

In 1935 the legislature amended the section by eliminating the proviso. Petitioner herein contends that the removal of said proviso extended the scope and effect of the decisions of the Illinois Appellate Courts and, unless modified or overruled by the Illinois Supreme Court, or by this court, made such decisions binding upon all courts of equal or inferior jurisdiction. Authority and support for this contention is set forth in the accompanying brief.

The State of Illinois is divided into four Appellate Court Districts. The First District, covering Cook County and Chicago, consists of three Divisions or three separate courts, while the Second, Third and Fourth Districts have only one court each. The obvious intention of the State Legislature, in removing the proviso to section 17, was to attempt to create harmony and uniformity in the various decisions and rulings of these courts.

On May 1, 1944, the First Division of the First District Appellate Court, in the case of *State Bank of Blue Island* v. *Kott,* 323 Ill. App. 27, clearly and expressly held that a counterclaim could be interposed as a defense in a confession case. On May 18, 1945, the Third Division of the same District rendered the decision complained of herein (*Bankers Building Inc.* v. *Bishop,* 326 Ill. App. 256) and ruled that a counterclaim could not be interposed in this confession case (R. 84-85), thereby depriving petitioner, who was defendant below, of an opportunity to present his defense.

Petitioner contends that under the provisions of section 17 of the Appellate Court Act, as amended, the prior ruling

in the *Kott* case established the law in this state to be that counterclaims may be interposed in confession cases. This principle of law has not been overruled or modified by either this court or by the Illinois Supreme Court and it has therefore become a substantive rule of law in this state upon which petitioner was entitled to rely.

The injustice as well as the illegality of the decision of the Appellate Court becomes more apparent when the ruling is examined in the light of the circumstances surrounding this case. At the time the decision was rendered, respondent had been adjudged bankrupt and the filing of claims against it would have afforded petitioner little or no relief. The suggestion of the Appellate Court, that petitioner seek relief under his counterclaim in another form, was therefore no mitigation of the court's unlawful denial of petitioner's right to assert a defense.

C

Date of Judgment Sought to Be Reviewed

The date of the judgment sought to be reviewed herein is January 15, 1946.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Illinois Supreme Court, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 29267, Bankers Building, Inc., Defendant-in-Error, *v.* Howard F. Bishop, Plaintiff-in-Error, and that the said judgment may be reversed by this Honorable

Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HOWARD F. BISHOP,
Petitioner,
By HOWARD F. BISHOP,
Counsel for Petitioner, Pro se.